

APPEAL NO. 180057  
FILED FEBRUARY 13, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 21, 2017, in (city), Texas, with (hearing officer) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to L2-3 retrolisthesis, L3-4 disc protrusion, L4-5 disc protrusion or herniated nucleus pulposus (HNP), L5-S1 disc protrusion or HNP, or nerve root impingement syndrome; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 5, 2017; and (3) the claimant's impairment rating (IR) is zero percent. The claimant appealed, disputing the ALJ's determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

**DECISION**

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury that extends to a lumbar sprain/strain, and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. S) as the designated doctor to determine MMI, IR, extent of the compensable injury, and ability to return to work. The claimant testified that she was injured when she fell while carrying a heavy box.

**CARRIER INFORMATION**

We note that the ALJ inadvertently listed Indemnity Insurance Company of North America as the true corporate name of the carrier. However, the carrier information sheet in evidence lists the carrier's true corporate name as Ace American Insurance Company.

**EXTENT OF INJURY**

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re*

*King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). The ALJ's determination that the compensable injury of (date of injury), does not extend to L2-3 retrolisthesis, L3-4 disc protrusion, L4-5 disc protrusion or HNP, L5-S1 disc protrusion or HNP, or nerve root impingement syndrome is supported by sufficient evidence and is affirmed.

### **MMI/IR**

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The ALJ found that the MMI/IR certification of Dr. S, the designated doctor, was not contrary to the preponderance of the other medical evidence, and determined that the claimant reached MMI on July 5, 2017, with a zero percent IR.

Dr. S examined the claimant on July 5, 2017. In evidence are three Reports of Medical Evaluation (DWC-69) from Dr. S dated July 5, 2017. In his attached narrative report Dr. S explained that the first DWC-69 certifying the claimant reached MMI on August 27, 2016, with a zero percent IR is based solely on the condition of a lower back muscular spasm; the second DWC-69 certifying the claimant had not reached MMI is based on disputed conditions of L2-3 retrolisthesis, L3-4 protrusion/HNP, L4-5 protrusion/HNP, L5-S1 protrusion/HNP, and L5-S1 nerve root impingement; and the third DWC-69 certifying the claimant reached MMI on July 5, 2017, with a five percent IR is based on a lumbar sprain/strain.

Also in evidence are two DWC-69s from (Dr. P). Dr. P examined the claimant on August 4, 2017. Dr. P explained in his attached narrative report that the first DWC-69 certifying the claimant reached MMI on July 5, 2017, with a five percent IR is based on low back muscle spasms, and the second DWC-69 certifying the claimant had not

reached MMI is based on HNPs at L3-4, L4-5, and L5-S1, and L5-S1 nerve root impingement.

As previously noted we have affirmed the ALJ's determination that the compensable injury of (date of injury), does not extend to L2-3 retrolisthesis, L3-4 disc protrusion, L4-5 disc protrusion or HNP, L5-S1 disc protrusion or HNP, or nerve root impingement syndrome, and the parties have stipulated that the compensable injury extends to a lumbar sprain/strain. Dr. S's certification that the claimant reached MMI on July 5, 2017, with a five percent IR is the only certification in evidence that considers and rates a lumbar sprain/strain. The ALJ's determination that the claimant reached MMI on July 5, 2017, is supported by sufficient evidence and is affirmed.

The ALJ also determined that the claimant's IR is zero percent. There is no MMI/IR certification in evidence from Dr. S or any other doctor that certifies the claimant reached MMI on July 5, 2017, with a zero percent IR. The ALJ found that Dr. S's certification is not contrary to the preponderance of the other medical evidence, and the evidence supports that finding. However, the ALJ mistakenly determined that the claimant's IR is zero percent when the evidence reflects that the impairment assessed by Dr. S for the lumbar sprain/strain with an MMI date of July 5, 2017, is five percent rather than zero percent. Accordingly, we reverse the ALJ's determination that the claimant's IR is zero percent, and we render a new decision that the claimant's IR is five percent, to conform to Dr. S's certification.

### **SUMMARY**

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to L2-3 retrolisthesis, L3-4 disc protrusion, L4-5 disc protrusion or HNP, L5-S1 disc protrusion or HNP, or nerve root impingement syndrome.

We affirm the ALJ's determination that the claimant reached MMI on July 5, 2017.

We reverse the ALJ's determination that the claimant's IR is zero percent, and we render a new decision that the claimant's IR is five percent.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION  
1999 BRYAN STREET, SUITE 900  
DALLAS, TEXAS 75201.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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K. Eugene Kraft  
Appeals Judge

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Margaret L. Turner  
Appeals Judge